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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CITIZENS FEDERAL SAVINGS AND LOAN ASSOCIATION OF DAYTON OHIO,

Appellant,

v.

VAN W. PAGE, *et al.*,

Appellees.

On Appeal From The Court of Appeals Twelfth Appellate District Of Ohio

BRIEF OF THE OHIO SAVINGS & LOAN LEAGUE AS *AMICUS CURIAE*

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TABLE OF CONTENTS

	Page
I. INTEREST OF THE OHIO SAVINGS & LOAN LEAGUE	1
II. STATEMENT OF THE CASE	6
III. SUMMARY OF ARGUMENT	8
IV. ARGUMENT	10
A. The Court Of Appeals' Decision Threatens The Uniform Enforceability Of The Due-On-Sale Clause	10
B. Interpretation Of The Due-On-Sale Clause As Not Applying To Sales By Installment Land Contract Will Seriously Impair If Not Extinguish The Effectiveness Of The Due-On-Sale Clause	13
C. Ohio Law, As Interpreted By The Court Of Appeals, Conflicts With, And Is Thus Preempted By, Federal Law	16
V. CONCLUSION	20

INDEX TO APPENDIX

	Page
Memorandum Decision and Judgment Entry	1a
Decision	11a
Entry Granting Summary Judgment	15a
Open-End Mortgage	17a
12 U.S.C. § 1464(a)	32a
Garn-St. Germain Depository Institutions Act of 1982	33a
12 C.F.R. § 545.8-3(f) & (g)	38a
12 C.F.R. § 556.9(f)	40a
Part 591—Preemption of State Due-On-Sale Laws [Title 12, C.F.R.]	41a
FHLBB Resolution No. 83-242	45a
Ohio Revised Code § 5313.01 Definitions	48a
FHLBB General Counsel Opinion	49a

TABLE OF AUTHORITIES

CASES: Page

Bradley v. *School Board of the City of Richmond*, 416 U.S. 696 (1974) 13

Fidelity Federal Savings and Loan Association v. *de la Cuesta*, 458 U.S. 141 (1982) ... 2-3, 5-6, 10, 14, 16, 20

First Federal Savings and Loan Association of Rapid City v. *Wick*, 322 N.W. 2d 860 (S.D. 1982) 5

Greater Louisville First Federal Savings and Loan Association v. *Etzler*, 659 S.W.2d 209 (Ky. 1983) 5

Lipps v. *First American Service Corp.*, 233 Va. 131 (1982) 5

Mills v. *Nashua Federal Savings and Loan Association*, 121 N.H. 722, 433 A.2d 1312 (1981) 5

Smith v. *Frontier Federal Savings and Loan Association*, 649 P. 2d 536 (Okla. 1982) 5

Thorpe v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969) 13

Williams v. *First Federal Savings and Loan Association of Arlington*, 651 F.2d 910 (4th Cir. 1981) *cert. denied* 454 U.S. 1151 (1982) 15

FEDERAL REGISTER:

41 Federal Register, p. 6283, 6285 (February 12, 1976) 6

FEDERAL REGULATIONS:

Code of Federal Regulations, Title 12, Sec. 545.6-11(f) (1982) 3, 8

Code of Federal Regulations, Title 12, Sec. 545.8-3 (1982) 2, 16

Code of Federal Regulations, Title 12, Sec. 545.8-3(f) (1982) 8, 16, 19

Code of Federal Regulations, Title 12, Sec. 545.8-3(f)(1) (1982) 3

Code of Federal Regulations, Title 12, Sec. 545.8-3(g) (1982) 3, 16, 19

Code of Federal Regulations, Title 12, Sec. 545.8-3(g)(1) (1982) 16

Table of Authorities Continued

Page

Code of Federal Regulations, Title 12, Sec. 556.9(f)(1) (1982) 8, 10

Code of Federal Regulations, Title 12, Sec. 591 et seq. (1982) 9

Code of Federal Regulations, Title 12, Sec. 591.5(b)(1)(i) (1982) 9

MISCELLANEOUS:

Advisory Opinion of the Federal Home Loan Bank Board Resolution No. 75-647 3

Federal Home Loan Bank Board Resolution No. 76-100 17

Federal Home Loan Bank Board Resolution No. 83-242 9

Federal Home Loan Bank Board General Counsel Opinion, May 29, 1981 ..... 14, 17

Note, *The Due-On-Sale Controversy: Beneficial Effects of the Garn-St. Germain Depository Institution Act of 1982*, 12 Duke L.J. 121 (1984) 6, 11

S. Rep. No. 91-761, 91st Cong., 2d Sess. 7, 25 (1970) . 17

S. Rep. No. 97-536, 97th Cong., 2d Sess. 20-21 (1982) 9, 11-12, 18-19

STATUTES:

Federal Home Loan Mortgage Corporation Act of 1970, (Pub. L. No. 91-351, 12 U.S.C. § 1451 *et seq.*) ... 4

Garn-St. Germain Depository Institutions Act of 1982, Sec. 341 (Pub. L. 97-320, 12 U.S.C. §§ 1701j-3(a) to 3(g) (1982) 3-4, 8-11, 13, 17-19

Home Owners' Loan Act of 1933, Sec. 5(a) (12 U.S.C. § 1464(a)) 2, 7

Ohio Revised Code, Secs. 5313 *et seq* 7-8

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BRIEF OF THE OHIO SAVINGS & LOAN LEAGUE AS *AMICUS CURIAE*

The Ohio Savings & Loan League ("Amicus" or "the League") files this *Amicus Curiae* brief with the consent of all parties to this case, in order to urge this Court to note probable jurisdiction to review the decision of the Ohio Court of Appeals.

The Ohio Savings & Loan League is a non-profit corporation, organized under the laws of Ohio, whose corporate purposes include the promotion of "the interests of savings and loan associations of the State of Ohio." The League represents more than three hundred savings and loan associations, both state and federally chartered, located within Ohio.

The League and its member associations have an immediate and vital interest in all court decisions which affect the rights, duties and obligations of Ohio savings and loan associations. More particularly in this case, the duties and obligations imposed upon savings and loan associations as mortgage lenders are of primary concern. Virtually all savings and loan associations finance the purchase of residential homes and provide a source of borrowing for consumers. Because the FNMA/FHLMC mortgage form in controversy is the most widely used mortgage form within the State of Ohio and is required by most participants in the secondary market, the League is concerned that the Ohio Court of Appeals holding that the FNMA/FHLMC due-on-sale clause is unenforceable with respect to a land contract sale will have a devastating impact upon the secondary mortgage market in Ohio and will adversely affect Ohio home buyers by making residential mortgage funds more difficult to obtain.

The doctrine of federal preemption as applied to the regulation of the savings and loan industry has been evolving since the Home Owners' Loan Act of 1933 was enacted authorizing the Federal Home Loan Bank Board (The "FHLBB" or "Board"), an agency of the United States, to prescribe rules and regulations for the operation of federal savings and loan associations. (Section 5(a) of the Home Owners Loan Act of 1933 (12 U.S.C. § 1464(a))).[1] The Board, in 1976, enacted regulations which permitted the exercise of a "due-on-sale" clause in

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[1] As this Court noted in *Fidelity Savings & Loan Assn.* v. *de la Cuesta*, 458 U.S. 141 (1982), even before adopting the due-on-sale regulations, the Board had interpreted 12 C.F.R. § 545.8-3(a) (1982) which required that all loan instruments "provide for full protection to the federal association" as authorizing federal savings and loans to exercise due-on-sale provisions, despite any state law to the contrary, because such clauses help ensure "full protection" to the lender.

mortgage contracts entered into by federally chartered savings and loan associations.[2] This Court held that those regulations were preemptive of state law inhibiting the exercise of the due-on-sale clause in *Fidelity Federal Savings and Loan Association* v. *de la Cuesta*, 458 U.S. 141 (1982). Preemption was later extended to *all* real property secured lenders by § 341 of the Garn-St. Germain Depository Institutions Act of 1982 (the "Garn-St.

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458 U.S. at 147, n.4. *See* Board's Advisory Opinion, Resolution No. 75-647 in *Schott* v. *Mission Federal Savings & Loan Assn.*, No. Civ-75-366, pp. 13-15 (C.D. Cal. July 30, 1975) hereinafter "*Schott* Advisory Opinion").

[2] 12 CFR § 545.6-11(f), now codified at 12 CFR § 545.8-3(f)(1982) which provides:

> (f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

See also subsection 545.8-3(g) (1982) limiting the exercise of the due-on-sale clause in certain cases:

> (g) *Limitations on the exercise of due-on-sale clauses.* With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument, (ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase;

Germain Act").[3] Consistent with the Board's regulations, the Federal Home Loan Mortgage Corporation (the "FHLMC"), a corporation created by Congress and under the direction of a Board of Directors comprised of the members of the Federal Home Loan Bank Board, has composed mortgage contracts with uniform, nationally applicable provisions, including a due-on-sale clause, in order to enhance and facilitate the secondary mortgage market as contemplated by Congress upon its creation of the FHLMC.[4] Because of their acceptability in the secondary mortgage market these uniform mortgage contracts are used in the vast majority of the residential mortgage lending transactions engaged in by members of the Ohio Savings and Loan League.[5]

This appeal presents the question whether the Court of Appeals of the State of Ohio, 12th Appellate District, erred in holding that state contract law may be applied to interpret the language expressed in the regulations of the

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[3] Pub. L. No. 97-320, 96 Stat. 1469, codified at 12 U.S.C. § 1701j-3(a) to 3(g)(1982).

[4] The primary mortgage market is that involving consumers who borrow money from savings and loan associations, usually securing such loans with their residences. The secondary market involves the sale of those mortgages to investors. Congress created the Federal Home Loan Mortgage Corporation (the "FHLMC") under the FHLMC Act of 1970, 12 U.S.C. (& Supp III) §§ 1451 *et seq.* The FHLMC purchases conventional mortgages from savings and loans and other mortgage originators and resells them to investors in the form of mortgage pass-through securities. The funds generated are used to acquire additional mortgages and these new funds are made available to the selling lender to make additional home loans.

[5] *See* Brief of Appellant, Citizens Federal, filed with this Court at p. 9, n. 9. Citizens Federal itself has entered into over 13,000 mortgages using the FHLMC uniform mortgage instrument with a combined value of over $755.3 million. It has sold over $200 million of these mortgages to FHLMC and $105 million into the Government National Mortgage Association program.

Board and incorporated into the FHLMC uniform mortgage contract. This question must be considered in light of the fact that the state court's interpretation of the regulatory language as exempting land sales contracts from the enforceability of the due-on-sale clause conflicts with the Board's interpretation of the language, with Congress' intent as expressed in the Garn-St. Germain Act, and with this Court's previous holding in *Fidelity Federal* v. *de la Cuesta*, *supra*. In that case, this Court held that federal law preempts state law inhibiting the exercise of the due-on-sale clause.[6]

The Ohio Savings & Loan League is particularly concerned with the adverse effects on both a national and state level that the judgment of the Court of Appeals will have on the primary and secondary mortgage markets, and as a result, on residential home buyers and lenders that engage in real property secured lending. As this Court recognized in *Fidelity Federal* v. *de la Cuesta*, *supra*, "restrictions on a savings and loan's ability to accelerate a loan upon transfer of the security would have a number of adverse effects." 458 U.S. at 146. These ill effects have been found by the Board to include: (1) the endangerment of the financial security and stability of federal associations resulting from the security property being transferred to a person whose ability to repay the

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[6] The courts in other cases involving due-on-sale clauses identical to or similar to the clause in the FNMA/FHLMC mortgage in the present case have interpreted the language in conformity with the Board's interpretation. *See Greater Louisville First Federal Savings and Loan Assn.* v. *Etzler*, 659 S.W.2d 209 (Ky. 1983); *Smith* v. *Frontier Federal Savings and Loan Assn.*, 649 P.2d 536 (Okla. 1982); *First Federal Savings and Loan Assn. of Rapid City* v. *Wick*, 322 N.W.2d 860 (S.D. 1982); *Mills* v. *Nashua Federal Savings and Loan Assn.*, 121 N.H. 722, 433 A.2d 1312 (1981); *Williams* v. *First Federal Savings and Loan Assn. of Arlington*, 651 F.2d 910 (4th Cir. 1981) *cert. denied* 454 U.S. 1151 (1982); *Lipps* v. *First American Service Corp.*, 233 Va. 131 (1982).

loan and properly maintain the property is inadequate; (2) the substantial reduction of the cash flow and net income of federal associations caused by the elimination of the due-on-sale clause, rendering mortgages a less attractive investment, and resulting in lenders charging higher interest rates and loan charges on home loans in order to offset losses; and (3) the impairment of the ability of federal associations to sell their home loans in the secondary mortgage market, by making such loans unsaleable or causing them to be sold at reduced prices[7] thereby reducing the flow of new funds for residential loans, which otherwise would be available. 458 U.S. at 146, *citing* 41 Fed. Reg. 6283, 6285 (1976).

If the decision below is permitted to stand, and state courts are free to interpret the FNMA/FHLMC mortgage contract so as to render the due-on-sale clause unenforceable when property is sold under a land contract, the impact upon the savings and loan industry and upon potential home buyers both in Ohio and across the nation will be severe. The League thus has a direct interest in urging this Court to note probable jurisdiction to review the decision of the Court of Appeals.

II. STATEMENT OF THE CASE

Appellant Citizens Federal Savings and Loan Association of Dayton, Ohio ("Citizens Federal") is a federal savings and loan association chartered and regulated by

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[7] The Government National Mortgage Association, the Federal National Mortgage Association ("FNMA") and the FHLMC, which together represent ten percent of the secondary mortgage market, require due-on-sale clauses in the conventional mortgages that they purchase. In lieu of the due-on-sale clause, the FNMA requires the loan to contain a seven year call option. Note, *The Due-on-Sale Controversy: Beneficial Effects of the Garn-St. Germain Depository Institution Act of 1982*, 12 Duke L.J. 121, 126 (1982).

the FHLBB pursuant to Section 5(a) of the Home Owners Loan Act of 1933 (12 U.S.C. § 1464(a)) ("HOLA").

On August 3, 1979, Appellees Van W. Page and Cynthia A. Page (the "Pages") borrowed $37,000 from Citizens Federal and secured that loan by entering into a mortgage with Citizens Federal as mortgagee. Appendix 17a. The mortgage used was a uniform FHLMC mortgage instrument which included a due-on-sale clause pursuant to which the mortgage could be called immediately due and payable upon the transfer of all or any part of the property encumbered by the mortgage. In 1982, the Pages sold their property to James D. Ethridge and Eva N. Ethridge (the "Ethridges") by entering into a land installment contract as permitted by Ohio Revised Code §§ 5313 *et seq.* The land contract was executed and recorded without the prior written consent of Citizens Federal.

Citizens Federal, believing that the transfer of the property by land installment contract was contrary to the due-on-sale clause in the mortgage, commenced an action to foreclose the mortgage. Appendix 2a.

Ultimately, the Ethridges moved for summary judgment. They contended that the land installment contract that they executed in conformity with Ohio Revised Code §§ 5313, *et seq.* resulted in the creation of a lien subordinate to the mortgage in favor of Citizens Federal and thus, the transfer of the property did not trigger the due-on-sale clause. Citizens Federal opposed the motion for summary judgment, relying upon the preemptive effect of the federal law and its incorporation into the uniform mortgage instrument. The trial court granted the defendants' motion for summary judgment. Appendix 11a.

The Court of Appeals, 12th Appellate District, affirmed the trial court's decision, adopting the reasoning that the transfer of the property by land installment contract merely created a lien subordinate to the mortgage, relying on Ohio Revised Code §§ 5513, *et seq.*, and that, therefore, the due-on-sale clause in the uniform instrument could not be enforced. Appendix 1a, 8a-9a. On March 28, 1984, the Supreme Court of Ohio, without comment, declined to hear the case.

III. SUMMARY OF ARGUMENT

FHLBB regulations in effect in 1979 when the mortgage contract was entered into by Citizens Federal and the Pages, explicitly authorized the use of the due-on-sale clause by federal savings and loan associations. 12 C.F.R. § 545.6-11(f), now codified at 12 C.F.R. § 545.8-3(f). The due-on-sale clause has been found to be a "valuable and often indispensable source of protection" for the financial soundness of lenders. 12 C.F.R. § 556.9(f)(1) (1982). Indeed, the competitive disparities that arose with respect to state chartered lenders in those states that restricted the use of the due-on-sale clause, after federally chartered lenders were authorized to use the clause, gave rise to the Garn-St. Germain Act, under which Congress preempted state restrictions on the exercise of the due-on-sale clause with regard to state as well as federally chartered lenders. If the decision below is allowed to stand, and the states are permitted to reinterpret federal regulatory language according to state law, thus avoiding the thrust of the federal law, the problems which gave rise to the Garn-St. Germain Act will recur.

The argument that *any* lien or encumbrance "subordinate to" the mortgage is exempt from the exercise of the due-on-sale clause is an overly broad interpretation of the regulatory language which would allow what was meant to be a limited exclusion to be used to completely

circumvent the enforceability of the due-on-sale clause.[8] As the FHLBB noted in Resolution No. 83-242, concerning the regulations that it enacted[9] pursuant to the Garn-St. Germain Act:

> The Board believes that if a contract-for-deed transfer were considered to be a subordinate lien or encumbrance within the meaning of section 341(d)(1) of the Act, it would effectively create a loophole which would render the Act meaningless. Moreover, such a clarification is consistent with prior opinions of the Board and case law. Therefore, the final regulation indicates that the creation of a vendor's interest in a contract for deed does not fall within the limitations of section 341(d)(1) of the Act.

FHLBB Resolution No. 83-242, April 26, 1983.

Finally, the language used in the FHLMC uniform mortgage instrument tracks the language of the regula-

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[8] The exception for liens subordinate to the mortgage was intended to apply to "further encumbrances of the property, such as second mortgages which are often used by families to send a child to college, or finance home improvements . . . as long as the encumbrance does not relate to a transfer of rights of occupancy in the property." S. Rep. No. 97-536, 97th Cong., 2d Sess. 24, Garn-St. Germain Depository Institutions Act of 1982, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, 3078.

[9] The regulations enacted pursuant to the Garn-St. Germain Act are codified at 12 C.F.R. §§ 591 *et seq.* Subsection 591.5(b)(1)(i) provides with regard to limitations on the exercise of the due-on-sale clause:

> (b) *Specific limitations.* With respect to any loan on the security of a home occupied or to be occupied by the borrower.
>
> (1) A lender shall not (except with regard to a reverse mortgage) exercise its option pursuant to a due-on-sale clause upon:
>
> (i) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property: *Provided*, that such lien or encumbrance is not created pursuant to a contract for deed.

tions authorizing the use of the due-on-sale clause and defining the exemptions from its application. Congress, by enacting the Garn-St. Germain Act, has made it clear both that the exercise of the due-on-sale clause is not to be subject to any limitation imposed by state law, and that the exemption from the exercise of the clause does not apply to land contracts. Since the due-on-sale provision was specifically authorized by federal law, it is enforceable.

IV. ARGUMENT

A) The Court Of Appeals' Decision Threatens The Uniform Enforceability Of The Due-On-Sale Clause.

As this Court observed in *Fidelity Federal Savings & Loan Association* v. *de la Cuesta*, 458 U.S. 141 (1981) "a savings and loan's mortgage lending practices are a critical aspect of its 'operation,' over which the [Federal Home Loan Bank] Board unquestionably has jurisdiction." 458 U.S. at 167. The Board has determined that due-on-sale clauses are "a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments." 12 C.F.R. § 556.9(f)(1) (1982).

The strength of the impact which the absence of the due-on-sale clause has on the viability of mortgage lending programs is demonstrated by the problems experienced by state chartered lenders after federally chartered lenders were authorized to include due-on-sale clauses in their mortgage contracts. When the FHLBB authorized the use of due-on-sale clauses by federally chartered savings and loan associations in 1976, a competitive disparity between state and federally chartered lenders was created in those states in which, under state law, due-on-sale clauses were unenforceable. The federally chartered lenders in such states could use the

clause to update the return on their loan portfolios. Since a federal lender could increase the return on its existing loans, it could afford to charge less for its new loans than could the state lender. Note, *The Due-On-Sale Controversy: Beneficial Effects of The Garn-St. Germain Depository Institutions Act of 1982*, 12 Duke L.J. 121, 124-25 (1984).

The difficulties that state lenders had in competing with the federal lenders eventually gave rise to the Garn-St. Germain Depository Institutions Act of 1982, which had the effect of preempting state restrictions on the enforceability of due-on-sale clauses both with regard to state and to federally chartered lenders. Pub. L. No. 97-320, 96 Stat. 1469 (codified at 12 U.S.C. § 1701j-3(a) to 3(g) (1982)). As was observed by the Senate Committee on Banking, Housing, and Urban Affairs, prior to the passage of the Garn-St. Germain Act:

> The Committee finds compelling reasons for Congress to address the problems confronting lenders and borrowers, which have arisen from state actions restricting the enforcement of due-on-sale clauses in home mortgages.
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> * * *
>
> [L]enders charge a premium for new loans in states which restrict due-on-sale because earnings from the new loan must offset older loans (which can not be turned over when due-on-sale clauses are unenforceable), and originating an assumable loan rather than a loan with an enforceable due-on-sale clause poses a greater risk to the lender, requiring a higher price for the mortgage. Thus, restrictions on due-on-sale clauses generally help existing homebuyers to the disadvantage of new homebuyers. Due-on-sale restrictions also encourage risky lending practices, outside the realm of the traditional mortgage credit delivery system, which intensify default risks. Finally, studies have concluded that these restrictions may lead to the complete dis-

appeance of that traditional mainstay of American homeowners—the long-term fixed rate mortgage.

For lenders, due-on-sale restrictions further extend the lives of older low interest mortgages, and prevent lenders from increasing the yields on those loans at the time the property is transferred. A recent Due-on-Sale Task Force assembled by the Federal Home Loan Bank Board concluded that the imposition of due-on-sale restrictions nationwide would create, within two years, annual losses of $600 to $800 million for federal savings and loans, and $1.0 to $1.3 billion for all federal and state savings and loan associations.

Due-on-sale restrictions also adversely affect secondary mortgage markets, which rely on uniform, homogenous mortgage documents to efficiently operate and provide mortgage money for lenders and homebuyers. State due-on-sale restrictions have caused the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Corporation to alter their investment practices in several states.

Finally, the recent Supreme Court decision in *Fidelity Federal Savings and Loan Association* v. *De La Cuesta*, upholding the right of federal savings and loan associations to enforce due-on-sale clauses, significantly disadvantaged state chartered and other lenders, and created uncertainty among homebuyers and sellers regarding the enforceability of due-on-sale. The pre-emption of state due-on-sale restrictions will place all lenders on a more competitive footing, and eliminate the confusion surrounding enforceability of due-on-sale.

S. Rep. No. 97-536, 97th Cong., 2d Sess. 20-21, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, 3074-75.

Clearly, unless the decision below is overturned, the state courts will be free to interpret the regulatory language incorporated in the FNMA/FHLMC uniform instrument according to their own state law and thus hold the due-on-sale clause to be unenforceable, contrary to

the intent of Congress. Lenders and residential home buyers will once again be faced with the difficulties that Congress sought to eliminate by enacting Garn-St. Germain. Furthermore, allowing each state to interpret or misinterpret the federally created due-on-sale clause language would create an atmosphere of uncertainty in the mortgage market and perhaps lead to its destruction, since each of the fifty states could interpret the due-on-sale provision according to its own contract law and find it to be unenfoeceable.

B) Interpretation Of The Due-On-Sale Clause As Not Applying To Sales By Installment Land Contract Will Seriously Impair If Not Extinguish The Effectiveness Of The Due-On-Sale Clause.

The Court of Appeals decision holding that the land sales contract in this case did not trigger the due-on-sale clause is not only contrary to the intent of the FHLBB and contrary to the intent of Congress as set forth in the Garn-St. Germain Act[10], but could severely cripple the Board's efforts to bolster both the residential mortgage market and the secondary mortgage market, to the detriment of home buyers and lenders.[11]

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[10] *See Bradley* v. *School Board of the City of Richmond*, 416 U.S. 696 (1974); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969) (appellate court must apply law in effect at the time of decision).

[11] When it announced its approval of the due-on-sale clause, the Board recognized that the provision would further three important goals: (1) it permits lenders to evaluate the creditworthiness of each borrower; (2) it permits lenders to increase the interest they can charge on long-term loan commitments during periods of rising interest rates and thus increase the amount of money available for new mortgages while decreasing the interest rate charged at the time of mortgage origination; and (3) it shortens the average life of conventional mortgages and facilitates the operation of the secondary mortgage market, since yields are increased to secondary market

The FHLBB General Counsel has opined that the Board clearly contemplated the application of the due-on-sale clause to all transactions involving the sale or transfer of all or any part of the real property, including transfers or sales under a land sales contract, "for otherwise that type of sale could be used by borrowers nationwide to circumvent the Board's response to the three major policy concerns it had when it adopted the regulations." FHLBB General Counsel Opinion, May 29, 1981.[12]

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investors and thus, more funds are attracted to secondary market investors and thus, more funds are attracted to the residential mortgage market. *Schott* Advisory Opinion.

The benefits derived from the use of the due-on-sale clause run to home buyers as well as to lenders. As this Court noted in *Fidelity Federal* v. *de la Cuesta*, the Board has determined that the elimination of the due-on-sale clause "will have an adverse [e]ffect on the earning power and financial stability of Federal associations, will impair the ability of Federal associations to sell their loans in the secondary markets, will reduce the amount of home-financing funds available to potential home buyers, and generally will cause a rise in home loan interest rates." 458 U.S. at 168, *citing Schott* Advisory Opinion at 2, 17-18.

[12] The Board General Counsel noted that Counsel for both the Board and the FHLMC have previously opined that a land sales contract would trigger a due-on-sale clause. A February 21, 1980 Board Opinion Letter stated:

> As indicated above, § 545.8-3(g) provides that an association shall not exercise a due-on-sale clause because of the creation of a subordinate lien. However the type of subordinate lien envisioned by this regulation is a standard second trust. We do not consider a land sales contract in which the parties intend to have full equitable title pass immediately to qualify as a "subordinate lien" within the meaning of the regulation. *We conclude, therefore, that a typical land sales contract* or the arrangements you describe on the purported loan, *would trigger a due-on-sale clause* . . . (Emphasis supplied)

The FHLMC Assistant General Counsel expressed the following opinion in a letter dated January 15, 1980:

> The fact which is central to a determination of whether the lender has the right to accelerate the loan is whether title to the

As was noted in a case similar to the case now before this Court, the argument that *any* lien or encumbrance "subordinate to" the mortgage is exempt from the enforceability of the due-on-sale clause, is an overly broad interpretation of the regulatory language which,

> . . .would encompass any interest created in the property. It thereby would cause what was clearly meant as a limited exclusion from the due-on-sale clause applicable in a few cases only to expand so hugely as to swallow up and extinguish altogether the due-on-sale clause itself. * * *
>
> In fact, the exception from the triggering of a due-on-sale clause when a subordinated lien or encumbrance was imposed on the property was a requirement of the FHLBB included in its overall authorization of the due-on-sale clause. It is absurd to think . . . that the provision was meant to take away completely with one hand what the Bank Board was plainly conferring with the other.

Williams v. *First Federal Savings & Loan Association of Arlington*, 651 F.2d 910, 920-21 (4th Cir. 1981), *cert. denied*, 454 U.S. 1151 (1982).

Allowing state courts to interpret the due-on-sale provision in order to prevent land sales contracts from triggering the acceleration of the mortgage loan will result in the state courts' nullification of federal preemption in the area of due-on-sale regulation in spite of con-

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property has been transferred. When property is sold under a land contract, legal title to the property is frequently not transferred to the buyer until some later time which is specified in the contract, i.e., after a certain percentage of the purchase price has been paid. Even though legal title may not be transferred immediately, however, equitable title is deemed to be transferred at the time of the sale. *Thus sale of the property under a land contract is as much a sale or transfer, which gives the lender the right to declare all sums secured by the mortgage to be immediately due and payable, as is the sale of the property through any other financing mechanism.* (Emphasis supplied)

gressional, administrative and United States Supreme Court rulings to the contrary.

C) Ohio Law, As Interpreted By The Court Of Appeals, Conflicts With, And Is Thus Preempted By, Federal Law

In 1976, the Board adopted regulations governing the due-on-sale practices of federal savings and loan associations. These regulations permitted federally chartered lenders to exercise a due-on-sale clause in mortgage contracts, and were held by this Court to be preemptive of conflicting state law in *Fidelity Federal* v. *de la Cuesta*. The regulations are codified today at 12 C.F.R. § 545.8-3.[13] The Board included four specific exemptions to the exercise of the due-on-sale clause in subsection 545.8-3(g)(1) which provides:

> With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) *Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument*, (ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase. (Emphasis added)

The General Counsel of the FHLBB has stated that subsection 545.8-3(g)(1)(i) does not prevent a sale of real estate under a land sales contract from triggering the application of a due-on-sale clause, and observed that the "Bank Board's Resolution initially proposing the due-on-sale regulations [provided that] 'The provisions of paragraph (f) would apply to any sale or transfer of the loan

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[13] *Fidelity Federal* v. *de la Cuesta* dealt specifically with 12 C.F.R. § 545.8-3(f) and (g), *see* note 1b *supra*, for text.

security property by the borrower . . . including any sale or transfer through an installment land contract or similar means of sale.' " FHLBB General Counsel Opinion, May 29, 1981, n.3., *citing* Bank Board Resolution No. 76-100, p. 8 (February 6, 1976).

The Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association, recognizing that a nationally uniform mortgage instrument was needed in order to make mortgage-based securities more attractive to investors in the secondary mortgage market, jointly created a uniform mortgage contract.[14] A due-on-sale clause was included in the instrument in order to enhance the mortgage's attractiveness in the secondary market. The language used in the uniform contract tracks the language in the regulations and is identical to the regulation in all relevant respects.

In 1982, Congress found it necessary to clarify its intention that the exercise of the due-on-sale clause by lenders not be subject to *any* limitation imposed by state law, and the Garn-St. Germain Act was passed. Section 1701j-3 was thus added to Title 12 of the Code, providing in part:

> (b) Loan contract and terms governing execution or enforcement of due-on-sale options and rights and remedies of lenders and borrowers; assumption of loan rates
>
> (1) Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may, subject to subsection (c) of this section, enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan.

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[14] Congress recognized as early as 1970 that a uniform mortgage instrument would be required by the entities it created to provide a secondary mortgage market. *See* S. Rep. No. 91-761, 91st Cong., 2d Sess. 7, 25 (1970), regarding the Emergency Home Finance Act of 1970.

The fact that 12 U.S.C. § 1701j-3 merely continues and clarifies preexisting federal law is evidenced by the Senate Report prepared in connection with the consideration and passage of the Garn-St. Germain Act. As that Report notes:

> The United States Supreme Court, in *Fidelity Federal Savings and Loan Association* v. *De La Cuesta* . . . recently upheld the right of federally chartered savings and loan associations and federal savings banks to include and enforce due-on-sale clauses persuant to a 1976 regulation issued by the Federal Home Loan Bank Board. Hence, the due-on-sale practices for federally chartered thrifts, for loans orginated by those thrifts, *will continue to be subject* to the Federal Home Loan Bank Board's *exclusive regulatory authority.* (Emphasis added)

S. Rep. No. 97-536, 97th Cong., 2d Sess. 24, *reprinted in* 1982 U.S. Code Cong. & Ad. News 3054, 3079.

Congress also made it clear that the exemption from the enforceability of the due-on-sale clause does not apply to sales through land contract. Subsection 1701j-3(d) provides:

> (d) Exemption of specified transfers or dispositions
>
> With respect to a real property loan secured by a lien on residential real property containing less than five dwelling units, including a lien on the stock allocated to a dwelling unit in a cooperative housing corporation, or on a residential manufactured home, a lender may not exercise its option pursuant to a due-on-sale clause upon —
>
> (1) the creation of a lien or other encumbrance subordinate to the lender's security instrument *which does not relate to a transfer of rights of occupancy in the property.*

The Senate Committee that reported on the Garn-St. Germain Act emphasized that, "It is not the intention of the Committee that Section 341(d) of the bill [12 U.S.C. § 1701j-3(d)] facilitate financing arrangements which are designed to circumvent the legitimate right of a lender to enforce a due-on-sale clause. . . ." S. Rep. No. 97-536, 97th Cong., 2d Sess. 24-25, *reprinted in* 1982 U.S. Code Cong. & Ad. News. 3054, 3078-79. The enforcement of the due-on-sale clause is prohibited only where its enforcement would be "unfair and inappropriate." *Id.* Such circumstances include involuntary transfers resulting from a borrower's death; transfers rearranging ownership rights within a family; and second mortgages used to finance college tuition or home improvements and not involving a transfer of rights of occupancy in the property. *Id.*

As the statute clearly states, the enforceability of the due-on-sale clause is to be determined only with reference to federal law. The legislative history of the Act indicates that, with respect to federal lenders, the statute merely reiterates what had been the law since the regulations authorizing federal lenders to use the due-on-sale clause were published. Furthermore, the statute explicity provides that the exemption from the exercise of the due-on-sale clause only applies to liens that do not involve the transfer of the right of occupancy of the property. The statute expressly and purposefully preempts state law to the contrary.

In short, the only question to be asked with regard to the enforceability of a due-on-sale clause in a FNMA/FHLMC mortgage instrument is whether or not it is valid under federal law. Under the FHLMC uniform mortgage in controversy both the contractual right of the lender to enforce the due-on-sale clause and the limitations imposed upon the right are directly derived from 12 C.F.R. § 545.8-3(f) and (g). Nevertheless, the Ohio Court of

Appeals, relying on Ohio statutory and case law regarding the nature of land installment contracts, has held that compliance with the federal law in drafting the uniform mortgage instrument rendered it ambiguous and unenforceable. This decision cannot be allowed to stand. The due-on-sale provision in controversy was specifically authorized by federal law. Therefore, it is enforceable in accordance with its terms.

IV. CONCLUSION

The decision of the Ohio Court of Appeals represents an attempt under the guise of interpretation of a mortgage contract under state law to subvert and avoid the clear holding of this court in *Fidelity Federal Savings and Loan Association* v. *de la Cuesta* and the actions of the Congress of the United States in the Garn-St. Germain Act. Since the decision involves the most widely used form of mortgage in the country, which was specifically drafted to comply with federal regulations, if allowed to stand this decision will effectively reverse the prior holding of this Court, the actions of Congress and the Board, and significantly adversely impact the residential mortgage market in every state. Probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX

Memorandum Decision and Judgment Entry.

In the Court of Appeals, Twelfth Appellate District of Ohio, Warren County, Ohio.

Citizens Federal Savings and Loan Association of Dayton, Ohio, Plaintiff-Appellant vs. Van W. Page, et al., Defendants-Appellees. Case No. CA83-03-018.

Filed: January 9, 1984.

John H. Curp, 110 North Main Street, Dayton, Ohio 45402, and Beth W. Schaeffer, 2700 Winters Bank Tower, Dayton, Ohio 45423, for Plaintiff-Appellant.

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Thomas S. Shore, Jr., Rendigs, Fry, Kiely & Dennis, 900 Central Trust Tower, Cincinnati, Ohio 45202, for Defendant-Appellee, Stanley E. Kolb.

Timothy A. Oliver, 324 East Warren Street, Lebanon, Ohio 45036, for Defendants-Appellees, James D. and Eva N. Ethridge.

William H. Kaufman, P. O. Box 280, Lebanon Bank Building, Lebanon, Ohio 45036, for Defendants-Appellees, Mary K. Dinus and Ohio Homestead Realtors.

PER CURIAM

This cause came on to be heard upon the appeal, transcript of the docket, journal entries and original papers from the Court of Common Pleas of Warren County, Ohio, transcript of proceedings, briefs and oral arguments of counsel.

Now, therefore, the assignments of error having been fully considered are passed upon in conformity with App. R. 12(A) as follows:

On August 3, 1979, appellees, Van W. Page and Cynthia A. Page (hereinafter "the Pages") borrowed the sum of thirty-seven thousand dollars ($37,000) from appellant, Citizens Federal Savings and Loan Association (hereinafter "Citizens Federal"), a federally chartered savings and loan association located in Dayton, Ohio. The note was secured by a mortgage on real property located at 75 Fitzgerald Way, Franklin, Ohio. On February 26, 1982, the Pages agreed to sell the property subject to the mortgage to appellees, James A. Ethridge and Eva N. Ethridge (hereinafter "the Ethridges") by means of land contract.

Paragraph 17 of the mortgage between the Pages and Citizens Federal contains an acceleration or "due-on-sale" clause which reads in part as follows:

> If all or any part of the Property or an interest therein is sold or transfered by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage, * * *. Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable.

Relying on the language quoted above, Citizens Federal declared the balance of the loan due and payable upon learning of the land contract arrangement between the Pages and the Ethridges. The Pages refused to tender the amount, taking the position that the due-on-sale clause contained in paragraph 17 of the mortgage was not triggered by the land contract because the land contract was clearly subordinate to the mortgage, and thus exempted by clause (a) of paragraph 17.

Citizens Federal filed a complaint seeking foreclosure in the Warren County Court of Common Pleas on August 30, 1982. Named as defendants were the Pages, as mortgagors, the Ethridges, as recipients of certain rights

in the subject real property stemming from the land contract agreement, and Warren County Treasurer Harry Cornett, who was joined in the event any real estate taxes or assessments on the property were at that time outstanding.

On December 21, 1982, the Ethridges filed a motion for summary judgment or for judgment on the pleadings, asserting that Citizens Federal failed to state a claim upon which relief could be granted. The trial court granted the motion on February 25, 1983. After finding that the Ethridges had standing to seek the requested relief, the court concluded that a land contract, being subordinate to the mortgage, fell within exemption (a) of paragraph 17 and thus did not trigger the due-on-sale clause.

Citizens Federal has timely filed this appeal from the decision below, and presents the following two assignments of error:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN CONCLUDING THAT THE MOVING DEFENDANT-APPELLEES AGAINST WHOM NO RELIEF WAS SOUGHT NOR CLAIM STATED HAD STANDING TO SEEK A SUMMARY JUDGMENT OF DISMISSAL OF THE COMPLAINT."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN DETERMINING THAT A LAND CONTRACT SALE OF REAL PROPERTY IS NOT AN EVENT WHICH TRIGGERS A DUE ON SALE CLAUSE IN A MORTGAGE IN WHICH A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION IS THE MORTGAGEE AND

WHICH CLAUSE CONTAINS LANGUAGE WHICH READS: 'IF ALL OR ANY PART OF THE PROPERTY OR AN INTEREST THEREIN IS SOLD OR TRANSFERRED BY BORROWER WITHOUT LENDER'S PRIOR WRITTEN CONSENT, EXCLUDING (a) THE CREATION OF A LIEN OR ENCUMBRANCE SUBORDINATE TO THE MORTGAGE . . . LENDER MAY, AT LENDER'S OPTION, DECLARE ALL THE SUMS SECURED BY THIS MORTGAGE TO BE IMMEDIATELY DUE AND PAYABLE."

Appellant's first assignment of error raises the issue of the Ethridges' standing to move for summary judgment. Civ. R. 56(B) states that "[a] party against whom a claim • • • is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." The rule does not indicate that certain parties may motion for summary judgment while other parties may not. The Ethridges' motion is styled in the alternative as a motion for judgment on the pleadings. Civ. R. 12(C) states that "[a]fter the pleadings are closed but within such time as not to delay the trial, *any party* may move for judgment on the pleadings." (Emphasis added.) Again, the only requirement for proper standing is that the movant be a *party*.

Appellees, James D. Ethridge and Eva N. Ethridge, were included in the foreclosure action by appellant because they were expected to claim an interest in the subject property by reason of the land contract agreement with the Pages. Certainly they were parties to the action when their motion was made. Therefore, we must conclude that the Ethridges had standing under the Civil Rules to move for summary judgment or for judgment on the pleadings. Appellant's first assignment of error is, accordingly, not well taken.

Appellant's second assignment of error requires us to examine the interplay between regulations promulgated by the Federal Home Loan Bank Board governing federal savings and loan associations, and state contract law. Citizens Federal Savings and Loan Association is a federally chartered savings and loan association organized pursuant to the existing laws of the United States. Congress, in the Homeowner's Loan Act of 1933, (12 U.S.C. Section 1461 *et seq*) has authorized the Federal Home Loan Bank Board to "provide for the organization, incorporation, examination, operation and regulation" of federal savings and loan associations via "such rules and regulations as it may prescribe." 12 U.S.C. Section 1464(a). These rules and regulations have the force and effect of federal statutory law. *First Federal Savings and Loan Association v. Myrick* (W.D. Ark. 1982), 533 F. Supp. 1041. State law, should it conflict with Federal Home Loan Bank Building Board Rules governing federal savings and loan associations, is preempted by the federal regulations. 12 C.F.R. 545.6(a)(2). *See also Fidelity Federal Savings and Loan Association v. de la Cuesta* (1982), ____ U.S. ____, 102 S.Ct. 3014.

Federal Home Loan Bank regulations dealing with due-on-sale clauses appear in 12 C.F.R. Section 545.8-3(f) and (g). 12 C.F.R. 545.8-3(f) states that a federal savings and loan association:

> "continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent."

The above applies "except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower * * *." 12 C.F.R. Section 545.8-3(f).

12 C.F.R. Section 545.8-3(g), entitled "Limitations on the exercise of due-on-sale clauses," states that a federal association, with respect to any loan made after July 31, 1976, secured by a home occupied or to be occupied by the borrower, "(1) shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument."

It is our view that the Federal Home Loan Bank Board, in its regulations promulgated pursuant to the Homeowner's Loan Act of 1933, did not intend to prohibit federal associations from exercising due-on-sale clauses when the borrower subsequently transfers his encumbered property by land contract. The language of 12 C.F.R. Section 545.8-3(f) grants the association general authority to exercise a due-on-sale clause if "all or any part of the real property securing the loan is sold or transferred by the borrower without the association's written consent." Section 545.8-3(g) provides exceptions to this general rule. To construe the exception styled "creation of a lien or encumbrance subordinate to the association's security instrument" to prevent the exercise of the clause in the event a federal mortgagor enters into a land contract with a third party would certainly "cause what was clearly meant as a limited exclusion from the due-on-sale clause applicable in a few cases only to expand so hugely as to swallow-up and extinguish altogether the due-on-sale clause itself." *Williams v. First Federal Savings and Loan Association of Arlington* (4th Cir. 1981), 651 F.2d 910, 920.

Support for this position is found in the wording of the Federal Home Loan Bank Board regulations. 12 C.F.R. Section 545.8-3(f) and (g), the exceptions set forth in paragraph (g) are limited to loans made "after July 31, 1976, on the security of a home occupied or to be occupied by the homeowner," indicating that the subordinate lien exception was meant to encompass "second mortgage" situations in which the original borrower continues to occupy the secured residence. In the case at bar, the Pages, after the land contract was signed, surrendered possession of the property secured by the mortgage with Citizens Federal to the Ethridges.

A review of the other exceptions in paragraph (g) ((ii) creation of a purchase money security interest for household appliances, (iii) transfer by devise, descent or operation of law or the death of a joint tenant, and (iv) granting of a leasehold interest of 3 years or less) further supports restricted interpretation of the subordinate lien exception. The exemptions above all apply to specific circumstances where the borrower, or a joint tenant with the borrower, remains in possession of the mortgaged property, or surrenders possession of such property for only a short period of time. Certainly the four exceptions, viewed together, indicate the subordinate lien exception was not intended to operate in a manner which would permit almost any transfer or sale of the property without the consent of the federal lending institution which, because it was first in time, would always have a lien superior to any lien created by the borrower.

Therefore, the regulations promulgated by the Federal Home Loan Board do not prohibit the exercise of a due-on-sale clause by a federal lending institution under the circumstances present in the case at bar. In other words, Citizens Federal *could* have contracted to exer-

cise the due-on-sale clause if the borrower were to transfer the secured property by land contract. In this situation, the regulations provide that use of the clause shall be "exclusively governed by the terms of the loan contract" between borrower and lender. 12 C.F.R. Section 545.8-3(f).

The mortgage instrument reads as follows:

> "If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage * * * Lender may, at Lender's option, declare all sums secured by this Mortgage to be immediately due and payable."

Although the language of the above parallels the Federal Home Loan Bank Board regulations in some respects, there is no specific language authorizing the lending institution to invoke the clause upon any sale or transfer of interest similar to the language in 12 C.F.R. Section 545.8-3(f). *See also Williams, supra.* Further the clause above does not indicate that the exception applies only to borrower-occupied homes, as do the Federal regulations.

The language of a contract must be construed so as to manifest the intent of the parties. *See U. S. Fire Insurance Co. v. Phil-Mar Corp,* (1957), 166 Dhio St. 85. The agreement between Citizens Federal and the Pages provides that the due-on-sale clause may be invoked upon a sale or transfer of interest in the secured property "excluding (a) the creation of a lien or encumbrance subordinate to this mortgage[.]" It is the law of Ohio that a sale by land contract creates an equitable lien in favor of the vendee for the amount paid on the purchase price. *See Wayne Building and Loan Co. v. Yarborough* (1967), 11 Ohio St. 2d 195, and *Butcher v.*

Kagy Lumber Co. (1955), 164 Ohio St. 85. Further, the lien created by the land contract is subordinate to the lien of appellant Citizens Federal. Therefore, we must conclude that the parties, by their contract, did not intend to grant appellant the right to exercise the due-on-sale clause in the event the Pages transfered the property pursuant to a land contract arrangement.

We concede that the instrument is ambiguous in that the mortgage fails to make it clear that the Federal Home Loan Board regulations regarding acceleration clauses were to be incorporated in their entirety. However, such ambiguity must be construed most strongly against the party that drafted the instrument. *Central Realty Co. v. Clutter* (1980), 62 Ohio St. 2d 411. If appellant wished to invoke the due-on-sale clause in the event of a land contract sale by the mortgagor, the language of the mortgage instrument should have made this intent clear; the subject instrument does not.

As a result, appellant's second assignment of error is not well taken, and is hereby overruled.

The assignments of error properly before this Court having been ruled upon as heretofore set forth, it is the Order of this Court that the judgment or final order herein appealed from be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Warren County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with App. R. 24.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Memorandum Decision and Judgment Entry shall constitute the mandate pursuant to App. R. 27.

To all of which the appellant, by its counsel, excepts.

HENDRICKSON, P.J., KOEHLER and GORMAN, J.J.

Judge Frank J. Gorman, of the Court of Common Pleas of Cuyhoga County, sitting by assignment of the Supreme Court of Ohio.

Decision.

State of Ohio, Warren County, Common Pleas Court.

Citizens Federal Savings and Loan Association of Dayton, Plaintiff vs. Van W. Page, et al., Defendants.

Filed: February 25, 1983

This matter is before the Court upon the Motion of the Defendants James D. Ethridge and Eva N. Ethridge for Summary Judgment in their favor against the Complaint. For purposes of this Decision the Court has considered the pleadings, the affidavits filed within the context of the Motion, and the written and oral arguments of counsel.

At the outset the Court notices that the Complaint does not state a claim or seek relief against these moving Defendants directly. The Plaintiff seeks judgment and foreclosure upon a note and mortgage executed by the Defendants Page. The Ethridges are not a party to the mortgage but have entered into a land contract to purchase the subject real estate from the Pages. The Complaint merely describes the Ethridges as having some interest in the subject real estate by virtue of the land contract. The Ethridges no doubt feel that the maintenance of this foreclosure proceedings by the Plaintiff threatens their land contract interest in the real estate, and therefore seek to defeat Plaintiff's claim or foreclosure. Basically, in this Motion, the Ethridges contend that the Plaintiff has no right to maintain a foreclosure proceedings against any Defendant by virtue of the provisions of its mortgage. Accordingly, we conclude that the Ethridges have standing to seek a Summary Judgment of dismissal of the Complaint.

The Plaintiff does not contend that the Pages are in arrears regarding any payments under the mortgage. Plaintiff's claim is solely based upon Paragraph 17 of the mortgage which reads in pertinent part as follows:

> "If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage ... Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable".

Plaintiff contends that the mere fact that the Pages have entered into a land contract to sell the subject property to the Ethridges entitles it, under the above provision of the mortgage, to declare the mortgage due and payable, and to foreclose.

The legality of so called "due-on-sale" clauses is not at issue here; nor is the legality of including land contracts in said clauses at issue here. The sole question before the Court is to determine whether or not, under the precise language of this particular instrument, the parties did in fact make the mere signing and recording of a land contract an actionable grounds for foreclosing the mortgage. The Court need only look to the plain meaning of the appropriate provision in the mortgage document, keeping in mind that the document was prepared by the Plaintiff.

It is beyond argument that the execution or signing of a land contract effectively "transfers" an "interest" in the subject property. Yet it is not the sale or transfer of *every interest* in property that the parties to the mortgage wished to make actionable. The document specifically created an exception with regard to the transfer of an interest that is a subordinate lien or encumbrance upon the mortgagor's property. The "intest" conveyed by this land contract is certainly a "lien or encumbrance" upon the property and it is certainly subordinate to the mortgage. In fact, a land contract will continue to be a lien until the land contract is

cancelled and/or a deed for the property is conveyed to the vendee — a transfer of an interest will have taken place which would clearly be actionable under the language of this mortgage provision.

Why the parties to the mortgage instrument wished to create such an exception is a question that is not appropriate for this Court to consider. Presumably, the exception serves the interests of one party or other to the mortgage. Nor can the Court consider whether the plain meaning of the words used in the document is the meaning actually intended by the draftor, or either party. Where the language in a written instrument is clear and unequivocal on its face, the Court may not inquire into the unexpressed intentions of the parties in order to arrive at a different meaning. For whatever reason, the parties to this document expressly created an exception to its "due-on-sale" clause. The execution of this land contract falls squarely within that exception. Therefore, we must conclude that the mere signing of a land contract by the Pages did not trigger the "due-on-sale" clause contained in this instrument. There being no evidence before the Court that the Pages have failed to comply with the terms of any of the other provisions of the mortgage, the Court finds that the Plaintiff is not entitled to foreclose the mortgage. Therefore, the Motion for Summary Judgment will be granted.

We note that the Complaint contains a purported Second Claim for relief. However, these paragraphs merely seem to apprise the Court that at some future time the Plaintiff may wish to allege facts giving rise to a further claim. No facts are therein stated giving rise to a claim for relief at present. Accordingly we find that the purported Second Claim fails to state a claim upon which relief can be granted, and it should be dismissed.

Counsel for Defendant James D. Ethridge and Eva N. Ethridge shall prepare the appropriate Judgment Entry.

/s/ P. DANIEL FEDDERS

P. DANIEL FEDDERS, JUDGE

CC: John H. Curp
Timothy A. Oliver
Stanley J. Cohen
William H. Kaufman
Thomas S. Shore, Jr.

Entry Granting Summary Judgment.

State of Ohio, Warren County, in the Court of Common Pleas.

Citizens Federal Savings and Loan Association of Dayton, Plaintiff, vs. Van W. Page, et al., Defendants. Case No. 43120.

Filed: March 30, 1983.

This cause came on to be heard on the Motion of Defendants James D. Ethridge and Eva N. Ethridge for a Summary Judgment pursuant to Rule 56, Ohio Rules of Civil Procedure. The Court having considered the pleadings in the action, the memorandums and affidavits of the parties and having heard the oral statements of Counsel, this Court issued its decision of February 25, 1983, the terms of which are incorporated herein by reference. The Court hereby finds that there is no genuine issue of fact to be submitted to the Court and hereby concludes that Defendants James D. Ethridge and Eva N. Ethridge are entitled to judgment as a matter of law.

It is hereby ORDERED, that the Defendants' Motion for a Summary Judgment is in all respect granted, and it is further ORDERED, that the Complaint be dismissed with costs to be paid by Plaintiff.

It is further ORDERED that this Court expressly determines that there is no just reason for delay in hearing

the appeal upon the entry of the final judgment of this order.

P. DANIEL FEDDERS, JUDGE

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Open-End Mortgage.

This Mortgage is made this third day of August, 1979 between the Mortgagor, Van W. Page and Cynthia A. Page, Husband and Wife (herein "Borrower") and the Mortgagee, Citizens Federal Savings and Loan Association of Dayton, an association organized and existing under the laws of The United States of America, whose address is 110 North Main Street, Dayton, Ohio 45402 (herein "Lender").

Whereas, Borrower is indebted to Lender in the principal sum of Thirty-Seven Thousand and 00/100 Dollars, which indebtedness is evidenced by Borrower's note dated August 3, 1979 (herein "Note"), providing for monthly installments of principal and interest, with the balance of the indebtedness, if not sooner paid, due and payable on September 1, 2009;

To Secure to Lender (a) the repayment of the indebtedness evidenced by the Note, with interest thereon, the payment of all other sums, with interest thereon, advanced in accordance herewith to protect the security of this Mortgage, and the performance of the covenants and agreements of Borrower herein contained, and (b) the repayment of any future advances, with interest thereon, made to Borrower by Lender pursuant to paragraph 21 hereof (herein "Future Advances"), Borrower does hereby mortgage, grant and convey to Lender the following described property in the County of Warren County, State of Ohio:

City of Franklin, and being 26.00 feet taken by parallel lines off the west side of lot Twelve (12) and 48.00 feet taken by parallel lines off the east side of lot Thirteen (13), said lots being in Franklin Woods, Section One, as recorded in Plat Book 6, Page 75 of the Warren County, Ohio records, being more particularly described as follows: Beginning at a point on the North right-of-way

line of Fitzgerald Way as dedicated in said plat, said point being 36.00 feet west of the southwest corner of lot 11 in said plat; thence South 89° 36′ 34″ west, along said right of way line, a distance of 74.00 feet to a point, said point being 14.00 feet east of the southeast corner of lot 14 in said plat; thence North 0° 23′ 26″ West, parallel to the east line of said lot 14, a distance of 120.00 feet to a point in the north line of said lot 13; thence North 89° 36′ 34″ East, along the north line of said lots 12 and 13, a distance of 74.00 feet to a point, said point being 36.00 feet west of the northwest corner of said lot 11; thence South 0° 23′ 26″ East, parallel to the west line of said lot 11, a distance of 120.00 feet to the place of beginning. Containing 8,880 square feet.

Which has the address of 75 Fitzgerald Way, Franklin, Ohio 45005 (herein "Property Address");

Together with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water, water rights, and water stock, and all fixtures now or hereafter attached to the property, all of which, including replacements and additions thereto, shall be deemed to be and remain a part of the property covered by this Mortgage; and all of the foregoing, together with said property (or the leasehold estate if this Mortgage is on a leasehold) are herein referred to as the "Property."

Borrower covenants that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property, that the Property is unencumbered, and that Borrower will warrant and defend generally the title to the Property against all claims and demands, subject to any declarations, easements or restrictions listed in a schedule of exceptions to

coverage in any title insurance policy insuring Lender's interest in the Property.

Uniform Covenants. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest. Borrower shall promptly pay when due the principal of and interest on the indebtedness evidenced by the Note, prepayment and late charges as provided in the Note, and the principal of and interest on any Future Advances secured by this Mortgage.

2. Funds for Taxes and Insurance. Subject to applicable law or to a written waiver by Lender, Borrower shall pay to Lender on the day monthly installments of principal and interest are payable under the Note, until the Note is paid in full, a sum (herein "Funds") equal to one-twelfth of the yearly taxes and assessments which may attain priority over this Mortgage, and ground rents on the Property, if any, plus one-twelfth of yearly premium installments for hazard insurance, plus one-twelfth of yearly premium installments for mortgage insurance, if any, all as reasonably estimated initially and from time to time by Lender on the basis of assessments and bills and reasonable estimates thereof.

The Funds shall be held in an institution the deposits or accounts of which are insured or guaranteed by a Federal or state agency (including Lender if Lender is such an institution). Lender shall apply the Funds to pay said taxes, assessments, insurance premiums and ground rents. Lender may not charge for so holding and applying the Funds, analyzing said account, or verifying and compiling said assessments and bills, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. Borrower and Lender may agree in writing at the time of execution of this Mortgage that interest on the Funds shall be paid to

Borrower, and unless such agreement is made or applicable law requires such interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for the sums secured by this Mortgage.

If the amount of the Funds held by Lender, together with the future monthly installments of Funds payable prior to the due dates of taxes, assessments, insurance premiums and ground rents, shall exceed the amount required to pay said taxes, assessments, insurance premiums and ground rents as they fall due, such excess shall be, at Borrower's option, either promptly repaid to Borrower or credited to Borrower on monthly installments of Funds. If the amount of the Funds held by Lender shall not be sufficient to pay taxes, assessments, insurance premiums and ground rents as they fall due, Borrower shall pay to Lender any amount necessary to make up the deficiency within 30 days from the date notice is mailed by Lender to Borrower requesting payment thereof.

Upon payment in full of all sums secured by this Mortgage, Lender shall promptly refund to Borrower any Funds held by Lender. If under paragraph 18 hereof the Property is sold or the Property is otherwise acquired by Lender, Lender shall apply, no later that immediately prior to the sale of the Property or its acquisition by Lender, any Funds held by Lender at the time of application as a credit against the sums secured by this Mortgage.

3. Application of Payments. Unless applicable law provides otherwise, all payments received by Lender

under the Note and paragraphs 1 and 2 hereof shall be applied by Lender first in payment of amounts payable to Lender by Borrower under paragraph 2 hereof, then to interest payable on the Note, then to the principal of the Note, and then to interest and principal on any Future Advances.

4. Charges; Liens. Borrower shall pay all taxes, assessments and other charges, fines and impositions attributable to the Property which may attain a priority over this Mortgage, and leasehold payments or ground rents, if any, in the manner provided under paragraph 2 hereof or, if not paid in such manner, by Borrower making payment, when due, directly to the payee thereof. Borrower shall promptly furnish to Lender all notices of amounts due under this paragraph, and in the event Borrower shall make payment directly, Borrower shall promptly furnish to Lender receipts evidencing such payments. Borrower shall promptly discharge any lien which has priority over this Mortgage; provided, that Borrower shall not be required to discharge any such lien so long as Borrower shall agree in writing to the payment of the obligation secured by such lien in a manner acceptable to Lender, or shall in good faith contest such lien by, or defend enforcement of such lien in, legal proceedings which operate to prevent the enforcement of the lien or forfeiture of the Property or any part thereof.

5. Hazard Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage", and such other hazards as Lender may require and in such amounts and for such periods as Lender may require; provided, that Lender shall not require that the amount of such cover-

age exceed that amount of coverage required to pay the sums secured by this Mortgage.

The insurance carrier providing the insurance shall be chosen by Borrower subject to approval by Lender; provided, that such approval shall not be unreasonably withheld. All premiums on insurance policies shall be paid in the manner provided under paragraph 2 hereof or, if not paid in such manner, by Borrower making payment, when due, directly to the insurance carrier.

All insurance policies and renewals thereof shall be in form acceptable to Lender and shall include a standard mortgage clause in favor of and in form acceptable to Lender. Lender shall have the right to hold the policies and renewals thereof, and Borrower shall promptly furnish to Lender all renewal notices and all receipts of paid premiums. In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

Unless Lender and Borrower otherwise agree in writing, insurance proceeds shall be applied to restoration or repair of the Property damaged, provided such restoration or repair is economically feasible and the security of this Mortgage is not thereby impaired. If such restoration or repair is not economically feasible or if the security of this Mortgage would be impaired, the insurance proceeds shall be applied to the sums secured by this Mortgage, with the excess, if any, paid to Borrower. If the Property is abandoned by Borrower, or if Borrower fails to respond to Lender within 30 days from the date notiee is mailed by Lender to Borrower that the insurance carrier offers to settle a claim for insurance benefits, Lender is authorized to collect and apply the insurance proceeds at Lender's option either to restora-

ton or repair of the Property or to the sums secured by this Mortgage.

Unless Lender and Borrower otherwise agree in writing, any such application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in paragraphs 1 and 2 hereof or change the amount of such installments. If under paragraph 18 hereof the Property is acquired by Lender, all right, title and interest of Borrower in and to any insurance policies and in and to the proceeds thereof resulting from damage to the Property prior to the sale or acquisition shall pass to Lender to the extent of the sums secured by this Mortgage immediately prior to such sale or acquisition.

6. Preservation and Maintenance of Property; Leaseholds; Condominiums; Planned Unit Developments. Borrower shall keep the Property in good repair and shall not commit waste or permit impairment or deterioration of the Property and shall comply with the provisions of any lease if this Mortgage is on a leasehold. If this Mortgage is on a unit in a condominium or a planned unit development, Borrower shall perform all of Borrower's obligations under the declaration or covenants creating or governing the condominium or planned unit development, the by-laws and regulations of the condominium or planned unit development, and constituent documents. If a condominium or planned unit development rider is executed by Borrower and recorded together with this Mortgage, the covenants and agreements of such rider shall be incorporated into and shall amend and supplement the covenants and agreements of this Mortgage as if the rider were a part hereof.

7. Protection of Lender's Security. If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is com-

menced which materially affects Lender's interest in the Property, including, but not limited to, eminent domain, insolvency, code enforcement, or arrangements or proceedings involving a bankrupt or decedent, then Lender at Lender's option, upon notice to Borrower, may make appearances, disburse such sums and take such action as is necessary to protect Lender's interest, including, but not limited to, disbursement of reasonable attorney's fees and entry upon the Property to make repairs. If Lender required mortgage insurance as a condition of making the loan secured by this Mortgage, Borrower shall pay the premiums required to maintain such insurance in effect until such time as the requirement for such insurance terminates in accordance with Borrower's and Lender's written agreement or applicable law. Borrower shall pay the amount of a mortgage insurance premium in the manner provided under paragraph 2 hereof.

Any amounts disbursed by Lender pursuant to this paragraph 7, with interest thereon, shall become additional indebtedness of Borrower secured by this Mortgage. Unless Borrower and Lender agree to other terms of payment, such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof, and shall bear interest from the date of disbursement at the rate payable from time to time on outstanding principal under the Note unless payment of interest at such rate would be contrary to applicable law, in which event such amounts shall bear interest at the highest rate permissable under applicable law. Nothing contained in this paragraph 7 shall require Lender to incur any expense or take any action hereunder.

8. Inspection. Lender may make or cause to be made reasonable entries upon and inspections of the Property, provided that Lender shall give Borrower notice prior

to any such inspection specifying reasonable cause therefor related to Lender's interest in the Property.

9. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of the Property, or part thereof, or for conveyance in lieu of condemnation, are hereby assigned and shall be paid to Lender.

In the event of a total taking of the Property, the proceeds shal lbe applied to the sums secured by this Mortgage, with the excess, if any, paid to Borrower. In the event of a partial taking of the Property, unless Borrower and Lender otherwise agree in writing, there shall be applied to the sums secured by this Mortgage such proportion of the proceeds as is equal to that proportion which the amount of the sums secured by this Mortgage immediately prior to the date of taking bears to the fair market value of the Property immediately prior to the date of taking, with the balance of the proceeds paid to Borrower.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the condemnor offers to make an award or settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date such notice is mailed. Lender is authorized to collect and apply the proceeds, at Lender's option, either to restoration or repair of the Property or to the sums secured by this Mortgage.

Unless Lender and Borrower otherwise agree in writing, any such application of proceeds to principal shall not extend or postpone the due date of the monthly installments referred to in paragraph 1 and 2 hereof or change the amount of such installments.

10. Borrower Not Released. Extension of the time for payment or modification of amortization of the sums secured by this Mortgage granted by Lender to any successor in interest of Borrower shall not operate to release, in any manner, the liability of the original Borrower and Borrower's successors in interest. Lender shall not be required to commence proceedings against such successor or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Mortgage by reason of any demand made by the original Borrower and Borrower's successors in interest.

11. Forbearance by Lender Not a Waiver. Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any such right or remedy. The procurement of insurance or the payment of taxes or other liens or charges by Lender shall not be a waiver of Lender's right to accelerate the maturity of the indebtedness secured by this Mortgage.

12. Remedies Cumulative. All remedies provided in this Mortgage are distinct and cumulative to any other right or remedy under this Mortgage or afforded by law or equity, and may be exercised concurrently, independently or successively.

13. Successors and Assigns Bound; Joint and Several Liability; Captions. The covenants and agreements herein contained shall bind, and the rights hereunder shall inure to, the respective successors and assigns of Lender and Borrower, subject to the provisions of paragraph 17 hereof. All covenants and agreements of Borrower shall be joint and several. The captions and headings of the paragraphs of this Mortgage are for convenience only and are not to be used to interpret or define the provisions hereof.

14. Notice. Except for any notice required under applicable law to be given in another manner, (a) any notice to Borrower provided for in this Mortgage shall be given by mailing such notice by certified mail addressed to Borrower at the Property Address or at such other address as Borrower may designate by notice to Lender as provided herein, and (b) any notice to Lender shall be given by certified mail, return receipt requested, to Lender's address stated herein or to such other address as Lender may designate by notice to Borrower as provided herein. Any notice provided for in this Mortgage shall be deemed to have been given to Borrower or Lender when given in the manner designated herein.

15. Uniform Mortgage; Governing Law; Severability. This form of mortgage combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property. This Mortgage shall be governed by the law of the jurisdiction in which the Property is located. In the event that any such provision or clause of this Mortgage or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage or the Note which can be given effect without the conflicting provision, and to this end the provisions of the Mortgage and the Note are declared to be severable.

16. Borrower's Copy. Borrower shall be furnished a conformed copy of the Note and of this Mortgage at the time of execution or after recordation hereof.

17. Transfer of the property; Assumption. If all or any part of the Property or an interest therein is sold or transferred by Borrower without Lender's prior written consent, excluding (a) the creation of a lien or encumbrance subordinate to this Mortgage, (b) the creation of a purchase money security interest for house-

hold appliances, (c) a transfer by devise, descent or by operation of law upon the death of a joint tenant or (d) the grant of any leasehold interest of three years or less not containing an option to purchase, Lender may, at Lender's option, declare all the sums secured by this Mortgage to be immediately due and payable. Lender shall have waived such option to accelerate if, prior to the sale or transfer, Lender and the person to whom the Property is to be sold or transferred reach agreement in writing that the credit of such person is satisfactory to Lender and that the interest payable on the sums secured by this Mortgage shall be at such rate as Lender shall request. If Lender has waived the option to accelerate provided in this paragraph 17, and if Borrower's successor in interest has executed a written assumption agreement accepted in writing by Lender, Lender shall release Borrower from all obligations under this Mortgage and the Note.

If Lender exercises such option to accelerate, Lender shall mail Borrower notice of acceleration in accordance with paragraph 14 hereof. Such notice shall provide a period of not less than 30 days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums prior to the expiration of such period, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 18 hereof.

Non-Uniform Covenants. Borrower and Lender further covenant and agree as follows:

18. Acceleration; Remedies. Except as provided in paragraph 17 hereof, upon Borrower's breach of any covenant or agreement of Borrower in this Mortgage, including the covenants to pay when due any sums secured by this Mortgage, Lender prior to acceleration shall mail notice to Borrower as provided in paragraph

14 hereof specifying: (1) the breach; (2) the action required to cure such breach; (3) a date, not less than 30 days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Mortgage, foreclosure by judicial proceeding and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default or any other defense of Borrower to acceleration and foreclosure. If the breach is not cured on or before the date specified in the notice, Lender at Lender's option may declare all of the sums secured by this Mortgage to be immediately due and payable without further demand and may foreclose this Mortgage by judicial proceeding. Lender shall be entitled to collect in such proceeding all expenses of foreclosure, including, but not limited to, costs of documentary exidence, abstracts and title reports.

19. Borower's Right to Reinstate. Notwithstanding Lender's acceleration of the sums secured by this Mortgage, Borrower shall have the right to have any proceedings begun by Lender to enforce this Mortgage discontinued at any time prior to entry of a judgment enforcing his Mortgage if: (a) Borrower pays Lender all sums which would be then due under this Mortgage, the Note and notes securing Further Advances, if any, had no acceleration occurred; (b) Borrower cures all breaches of any other covenants or agreements of Borrower contained in this Mortgage; (c) Borrower pays all reasonable expenses incurred by Lender in enforcing the covenants and agreements of Borrower contained in this Mortgage and in enforcing Lender's remedies as provided in paragraph 18 hereof, including, but not limited

to, reasonable attorney's fees; and (d) Borrower takes such action as Lender may reasonably require to assure that the lien of this Mortgage, Lender's interest in the Property and Borrower's obligation to pay the sums secured by this Mortgage shall continue unimpaired. Upon such payment and cure by Borrower, this Mortgage and the obligations secured hereby shall remain in full force and effect as if no acceleration had occurred.

20. Assignment of Rents; Appointment of Receiver. As additional security hereunder, Borrower hereby assigns to Lender the rents of the Property, provided that Borrower shall, prior to acceleration under paragraph 18 hereof or abandonment of the Property, have the right to collect and retain such rents as they become due and payable.

Upon acceleration under paragraph 18 hereof or abandonment of the Property, Lender shall be entitled to have a receiver appointed by a court to enter upon, take possession of and manage the Property and to collect the rents of the Property, including those past due. All rents collected by the receiver shall be applied first to payment of the costs of management of the Property and collection of rents, including, but not limited to, receiver's fees, premiums on receiver's bonds and reasonable attorney's fees, and then to the sums secured by this Mortgage. The receiver shall be liable to account only for those rents actually received.

21. Future Advances. Upon request of Borrower, Lender, at Lender's option prior to release of this Mortgage, may make Future Advances to Borrower. Such Future Advances, with interest thereon, shall be secured by this Mortgage when evidenced by promissory notes stating that said notes are secured hereby. At no time shall the principal amount of the indebtedness secured by this Mortgage, not including sums advanced in ac-

cordance herewith to protect the security of this Mortgage, exceed the original amount of the Note plus US $ — 0 —.

22. Release. Upon payment of all sums secured by this Mortgage, Lender shall discharge this Mortgage, without charge to Borrower. Borrower shall pay all costs of recordation, if any.

In Witness Whereof, Borrower has executed this Mortgage.

/s/ Van W. Page

Van W. Page — Borrower

/s/ Cynthia A. Page

Cynthia A. Page — Borrower

Witnesses:

/s/ Richard E. Burger

Richard E. Burger

/s/ Judy L. Slyfield

Judy L. Slyfield

State of Ohio, Montgomery County ss:

On this 3 day of August —, 1979 before me, a Notary Public in and for said County and State, personally appeared Van W. Page and Cynthia A. Page, Husband and Wife, the individual(s) who executed the foregoing instrument and acknowledged that they did examine and read the same and did sign the foregoing instrument, and that the same is their free act and deed.

In Witness Whereof, I have hereunto set my hand and official seal.

RICHARD E. BURGER

Notary Public

[SEAL]

12 U.S.C. § 1464(a)

§ 1464. Thrift Institutions

Organizations authorized;

Federal mutual savings bank activities

(a) **Chartering and purpose.** In order to provide thrift institutions for the deposit or investment of funds and for the extension of credit for homes and other goods and services, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as Federal savings and loan associations, or Federal savings banks and to issue charters therefor, giving primary consideration to the best practices of thrift institutions in the United States. The lending and investment authorities are conferred by this section to provide such institutions the flexibility necessary to maintain their role of providing credit for housing.

Garn-St Germain Depository Institutions Act of 1982.

SECTION 1. This Act may be cited as the "Garn-St Germain Depository Institutions Act of 1982".

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Part C — Preemption of Due on Sale Prohibitions.

DUE-ON-SALE CLAUSES

SEC. 341. (a) For the purpose of this section—

(1) the term "due-on-sale clause" means a contract provision which authorizes a lender, at its option, to declare due and payble sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent;

(2) the term "lender" means a person or government agency making a real property loan or any assignee or transferee, in whole or in part, of such a person or agency;

(3) the term "real property loan" means a loan, mortgage, advance, or credit sale secured by a lien on real property, the stock allocated to a dwelling unit in a cooperative housing corporation, or a residential manufactured home, whether real or personal property; and

(4) the term "residential manufactured home" means a manufactured home as defined in section 603(6) of the National Manufactured Home Construction and Safety Standards Act of 1974 which is used as a residence; and

(5) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands,

Guam, the Northern Mariana Islands, American Samoa, and the Trust Territory of the Pacific Islands.

(b)(1) Notwithstanding any provision of the constitution or laws (including the judicial decisions) of any State to the contrary, a lender may, subject to subsection (c), enter into or enforce a contract containing a due-on-sale clause with respect to a real property loan.

(2) Except as otherwise provided in subsection (d), the exercise by the lender of its option pursuant to such a clause shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and the borrower shall be fixed and governed by the contract.

(3) In the exercise of its option under a due-on-sale clause, a lender is encouraged to permit an assumption of a real property loan at the existing contract rate or at a rate which is at or below the average between the contract and market rates, and nothing in this section shall be interpreted to prohibit any such assumption.

(c)(1) In the case of a contract involving a real property loan which was made or assumed, including a transfer of the liened property subject to the real property loan, during the period beginning on the date a State adopted a constitutional provision or statute prohibiting the exercise of due-on-sale clauses, or the date on which the highest court of such State has rendered a decision (or if the highest court has not so decided, the date on which the next highest appellate court has rendered a decision resulting in a final judgment if such decision applies State-wide) prohibiting such exercise, and ending on the date of enactment of this section, the provisions of subsection (b) shall apply only in the case of a transfer which occurs on or after the expiration of

3 years after the date of enactment of this Act, except that —

(A) a State, by a State law enacted by the State legislature prior to the close of such 3-year period, with respect to real property loans originated in the State by lenders other than national banks, Federal savings and loan associations, Federal savings banks, and Federal credit unions, may otherwise regulate such contracts, in which case subsection (b) shall apply only if such State law so provides; and

(B) the Comptroller of the Currency with respect to real property loans originated by national banks or the National Credit Union Administration Board with respect to real property loans originated by Federal credit unions may, by regulation prescribed prior to the close of such period, otherwise regulate such contracts, in which case subsection (b) shall apply only if such regulation so provides.

(2)(A) For any contract to which subsection (b) does not apply pursuant to this subsection, a lender may require any successor or transferee of the borrower to meet customary credit standards applied to loans secured by similar property, and the lender may declare the loan due and payable pursuant to the terms of the contract upon transfer to any successor or transferee of the borrower who fails to meet such customary credit standards.

(B) A lender may not exercise its option pursuant to a due-on-sale clause in the case of a transfer of a real property loan which is subject to this subsection where the transfer occurred prior to the date of enactment of this Act.

(C) This subsection does not apply to a loan which was originated by a Federal savings and loan association or Federal savings bank.

(d) A lender may not exercise its option pursuant to a due-on-sale clause upon —

(1) the creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property;

(2) the creation of a purchase money security interest for household appliances;

(3) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(4) the granting of a leasehold interest of three years or less not containing an option to purchase;

(5) a transfer to a relative resulting from the death of a borrower;

(6) a transfer where the spouse or children of the borrower become an owner of the property;

(7) a transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property;

(8) a transfer into an inter vivos trust in which the borrower is and remains a beneficiary and which does not relate to a transfer of rights of occupancy in the property; or

(9) any other transfer or disposition described in regulations prescribed by the Federal Home Loan Bank Board.

(e)(1) The Federal Home Loan Bank Board, in consultation with the Comptroller of the Currency and the

National Credit Union Administration Board, is authorized to issue rules and regulations and to publish interpretations governing the implementation of this section.

(2) Notwithstanding the provisions of subsection (d), the rules and regulations prescribed under this section may permit a lender to exercise its option pursuant to a due-on-sale clause with respect to a real property loan and any related agreement pursuant to which a borrower obtains the right to receive future income.

(f) The Federal Home Loan Mortgage Corporation (hereinafter referred to as the "Corporation") shall not, prior to July 1, 1983, implement the change in its policy announced on July 2, 1982, with respect to enforcement of due-on-sale clauses in real property loans which are owned in whole or in part by the Corporation.

(g) Federal Home Loan Bank Board regulations restricting the use of a balloon payment shall not apply to a loan, mortgage, advance, or credit sale to which this section applies.

12 C.F.R. § 545.8-3 (f) & (g)

(f) *Due-on-sale clauses.* An association continues to have the power to include, as a matter of contract between it and the borrower, a provision in its loan instrument whereby the association may, at its option, declare immediately due and payable sums secured by the association's security instrument if all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent. Except as provided in paragraph (g) of this section with respect to loans made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, exercise by the association of such option (hereafter called a due-on-sale clause) shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the association and borrower shall be fixed and governed by that contract.

(g) *Limitations on the exercise of due-on-sale clauses.* With respect to any loan made after July 31, 1976, on the security of a home occupied or to be occupied by the borrower, a Federal association: (1) Shall not exercise a due-on-sale clause because of (i) creation of a lien or other encumbrance subordinate to the association's security instrument, (ii) creation of a purchase money security interest for household appliances; (iii) transfer by devise, descent, or operation of law on the death of a joint tenant; or (iv) granting of a leasehold interest of three years or less not containing an option to purchase; (2) shall not impose a prepayment charge or equivalent fee for acceleration of the loan by exercise of a due-on-sale clause; and (3) waives its option to exercise a due-on-sale clause as to a specific transfer if, before the transfer, the association and the person to whom the property is to be sold or transferred (the existing borrower's successor in interest) agree in writing that the

person's credit is satisfactory to the association and that interest on sums secured by the association's security interest will be payable at a rate the association shall request. Upon such agreement and resultant waiver the association shall release the existing borrower from all obligations under the loan instruments, and the association is deemed to have made a new loan to the existing borrower's successor in interest.

12 C.F.R. §556.9(f)

§556.9 Imposition of late charges and due-on-sale clauses.

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(f) *Due-on-sale policy and Federal preemption.* (1) Federal associations are obliged to take reasonable precautions to protect themselves against the economic risks associated with mortgage lending, including the risk that the cost of lendable funds will exceed the yield from existing mortgage loans, and that sharply rising interest rates will reduce substantially the value of existing mortgage assets. In this connection, the Board has determined that the due-on-sale clause normally is a valuable and often an indispensable source of protection for the financial soundness of Federal associations and for their continued ability to fund new home loan commitments. Consequently, the Board for many years has authorized due-on-sale clauses for use by Federal associations. However, because the Board desires to afford associations the flexibility to accommodate special situations and circumstances, §545.8-3(f) of this Subchapter by its terms merely authorizes rather than compels the inclusion and exercise of due-on-sale clauses in mortgage loans.

(2) Paragraph (f) of §545.8-3 confirms the continuing authority of Federal associations to include due-on-sale clauses in their mortgage loan contracts and to exercise such clauses, subject only to the express limitations contained in §545.8-3(g). Due-on-sale practices of Federal associations shall be governed exclusively by the Board's regulations, in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise (including, but not confined to, state law prohibitions against restraints on alienation, prohibitions against penalties and forfeitures, equitable restrictions and state law dealing with equitable transfers).

PART 591 — PREEMPTION OF STATE DUE-ON-SALE LAWS [TITLE 12, C.F.R.]

§591.1 Authority, Purpose, and Scope.

(a) *Authority.* This part contains regulations issued under section 5 of the Home Owners' Loan Act of 1933, as amended, and under section 341 of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. 97-320, 96 Stat. 1469, 1505-1507.

(b) *Purpose and scope.* The purpose of this permanent preemption of state prohibitions on the exercise of due-on-sale clauses by all lenders, whether Federally- or state-chartered, is to reaffirm the authority of Federal savings and loan associations to enforce due-on-sale clauses, and to confer on other lenders generally comparable authority with respect to the exercise of such clauses. This part applies to all real property loans, and all lenders making such loans, as those terms are defined in §591.2 of this Part.

§591.2 Definitions.

For the purposes of this Part, the following definitions apply:

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(b) "Due-on-sale clause" is a contract provision which authorizes the lender, at its option, to declare immediately due and payable sums secured by the lender's security instrument upon a sale of transfer of all or any part of the real property securing the loan without the lender's prior written consent. For purposes of this definition, a "sale or transfer" means the conveyance of real property of any right, title or interest therein, whether legal or equitable, whether voluntary or involuntary, by outright sale, deed, installment sale contract, land contract, contract for deed, leasehold interest with a term

greater than three years, lease-option contract or any other method of conveyance of real property interests.

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(g) "Lender" means a person or government agency making a real property loan, including without limitation, individuals, Federal associations, state-chartered savings and loan associations, national banks, state-chartered banks and state-chartered mutual savings banks, Federal credit unions, state-chartered credit unions, mortgage banks, insurance companies and finance companies which make real property loans, manufactured-home retailers who extend credit, agencies of the Federal government, any lender approved by the Secretary of Housing and Urban Development for participation in any mortgage insurance program under the National Housing Act, and any assignee or transferee, in whole or part, of any such persons or agencies.

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(l) "Real property loan" means any loan, mortgage, advance or credit sale secured by a lien on real property, the stock or membership certificate allocated to a dwelling unit in a cooperative housing corporation, or a residential manufactured home, whether real or personal property.

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§591.3 Loans originated by Federal associations.

(a) With regard to any real property loan originated or to be originated by a Federal association, as a matter of contract between it and the borrower, an association continues to have the power to include a due-on-sale clause in its loan instrument.

(b) Except as otherwise provided in §591.5 of this Part with respect to any such loan made on the security of a home occupied or to be occupied by the borrower,

exercise by any lender of a due-on-sale clause in a loan originated by a Federal association shall be exclusively governed by the terms of the loan contract, and all rights and remedies of the lender and borrower shall at all times be fixed and governed by that contract.

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§591.5 Limitation on exercise of due-on-sale clauses.

(a) *General.* Except as provided in §§591.4 (c) and (d)(4) of this Part due-on-sale practices of Federal associations and other lenders shall be governed exclusively by the Board's regulations, in preemption of and without regard to any limitations imposed by state law on either their inclusion or exercise including, without limitation, state law prohibitions against restraints on alienation, prohibitions against penalties and forfeitures, equitable restrictions and state law dealing with equitable transfers.

(b) *Specific limitations.* With respect to any loan on the security of a home occupied or to be occupied by the borrower.

(1) A lender shall not (except with regard to a reverse mortgage) exercise its option pursuant to a due-on-sale clause upon:

(i) The creation of a lien or other encumbrance subordinate to the lender's security instrument which does not relate to a transfer of rights of occupancy in the property: *Provided*, that such lien or encumbrance is not created pursuant to a contract for deed.

(ii) The creation of a purchase-money security interest for household appliances;

(iii) A transfer by devise, descent, or operation of law on the death of a joint tenant or tenant by the entirety;

(iv) The granting of a leasehold interest which has a term of three years or less and which does not contain an option to purchase (that is, either a lease of more than three years or a lease with an option to purchase will allow the exercise of a due-on-sale clause);

(v) A transfer, in which the transferee is a person who occupies or will occupy the property, which is: (A) A transfer to a relative resulting from the death of the borrower; (B) a transfer where the spouse or child(ren) becomes an owner of the property; or (C) a transfer resulting from a decree of dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement by which the spouse becomes an owner of the property; or

(vi) A transfer into an *inter vivos* trust in which the borrower is a and remains the beneficiary and occupant of the property, unless, as a condition precedent to such transfer, the borrower refuses to provide the lender with reasonable means acceptable to the lender by which the lender will be assured of timely notice of any subsequent transfer of the beneficial interest or change in occupancy.

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FHLBB Resolution No. 83-242

FEDERAL HOME LOAN BANK BOARD

12 CFR Parts 556, 590 and 591

[No. 83-242]

Preemption of State Due-on-Sale Laws

Dated April 26, 1983.

Agency: Federal Home Loan Bank Board.

Action: Final rule

Summary: The Federal Home Loan Bank Board ("Board") has implemented §341 of the Garn-St Germain Depository Institutions Act of 1982, which provides for federal preemption of state laws restricting the right of any lender to exercise its contractual obligation to declare immediately due and payable sums secured by the lender's security instrument if all or any part of the real property securing the loan is sold or transferred without the lender's prior written consent. To that end, the Board has revised its existing regulations and issued new regulations regarding preemption of state laws restricting the use of due-on-sale clauses with respect to both federally and non-federally chartered lenders.

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Supplementary Information: Section 341 of the Garn-St Germain Depository Institutions Act of 1982 ("Act"), Pub. L. No. 97-320, 96 Stat. 1469, 1505, provides for federal preemption of state laws restricting the right of lenders to exercise their contractual right to declare a real property mortgage due and payable pursuant to a due-on-sale clause if all or any part of the real property is sold or transferred without the lender's prior written consent. The statutory preemption is, however, subject to a "window-period" which excepts certain loans origi-

nated or assumed after state action which (by statute, constitutional provision or judicial decision) restricted the enforcement of due-on-sale clauses.

Section 341(e)(1) of the Act authorized the Board in consultation with the Comptroller of the Currency and the National Credit Union Administration Board to issue regulations and to publish interpretations to implement the national policy governing the preemption of state laws restricting the exercise of due-on-sale clauses by both federally and non-federally chartered lenders. Prior to enactment of the Act on October 15, 1982, the Board had promulgated regulations affirming the right of federal associations to exercise due-on-sale clauses notwithstanding restrictive state laws, subject to certain enumerated limitations (12 CFR 545.8-3 (f) and (g), 556.9(c) (1976)).

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Limitation on Exercise of Due-on-Sale Clauses

Borrower-Occupied Homes. Consistent with Act section 341(d)(1), proposed §591.5(b) set forth a list of statutory restrictions on the exercise of due-on-sale clauses for real property loans originated by all lenders, including window-period loans. The Board further noted in the preamble that it proposed to modify the statutory scheme by providing that the restrictions listed in the statute would apply only to loans made on homes occupied or to be occupied by the borrower. While the Board has carefully evaluated comments objecting to this limitation, it has determined to retain this principle in accordance with its belief that this approach is most consistent with the Congressional purpose of restricting due-on-sale exercise to protect consumers. S. Rep. at 24-25. A structural and historical analysis of the exemptions also supports the Board's interpretation that they

apply only to borrower-occupants. To a large extent, the exemptions in the Act are extracted directly from the Board's existing due-on-sale regulations and statements of policy in which the exemptions were intended only to apply to borrower-occupants. In light of the Board's pre-existing interpretation and expressed intent regarding these exemptions and the subsequent restatement of those exemptions in the Act, the Board believes that applying the restrictions only to borrower-occupied home loans is most consistent with the intent of Congress. Accordingly, loans on all property other than borrower-occupied homes are not subject to the restrictions set out in final §591.5(b).

Secondary Liens. Final §591.5(b)(1)(i) clarifies that the limitation on the exercise of a due-on-sale clause in the event of the creation of a secondary lien or encumbrance does not include a transfer of the property pursuant to a contract for deed.

The Board believes that if a contract-for-deed transfer were considered to be a subordinate lien or encumbrance within the meaning of section 341(d)(1) of the Act, it would effectively create a loophole which would render the Act meaningless. Moreover, such a clarification is consistent with prior opinions of the Board and case law. Therefore, the final regulation indicates that the creation of a vendor's or vendee's interest in a contract for deed does not fall within the limitations of section 341(d)(1) of the Act.

In addition, as a technical matter, the Board has modified the language of the proposal to cover liens not relating to "a transfer of *rights* of occupancy in the property" to conform to the literal language of Act section 341(d)(1).

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Ohio Revised Code.

§5313.01 Definitions.

As used in Chapter 5313 of the Revised Code:

(A) "Land installment contract" means an executory agreement which by its terms is not required to be fully performed by one or more of the parties to the agreement within one year of the date of the agreement and under which the vendor agrees to convey title in real property located in this state to the vendee and the vendee agrees to pay the purchase price in installment payments, while the vendor retains title to the property as security for the vendee's obligation. Option contracts for the purchase of real property are not land installment contracts.

(B) "Property" means real property located in this state improved by virtue of a dwelling having been erected on the real property.

(C) "Vendor" means any individual, partnership, corporation, association, trust, or any other group of individuals however organized making a sale of property by means of a land installment contract.

(D) "Vendee" means the person who acquires an interest in property pursuant to a land installment contract, or any legal successor in interest to that person.

(E) "Legal description" means a description of the property by metes and bounds or lot numbers of a recorded plat including a description of any portion of the property subject to an easement or reservation, if any.

FHLBB General Counsel Opinion, May 29, 1981

* * *

(2) A federal association may exercise a due-on-sale clause in connection with a transfer by a land sales contract.

We believe a land sales contract gives federal associations the right under due-on-sale clauses to declare all sums secured by the mortgage to be immediately due and payable. The Bank Board has stated the following three critical policy reasons for adopting its due-on-sale regulations, expressly authorizing federal savings and loan associations to include due-on-sale clauses in residential mortgages:

(1) it permits lenders to evaluate the credit of each borrower;

(2) it permits lenders to increase mortgage portfolio yields during a rising interest rate market, thereby decreasing the interest rates generally charged at the time of mortgage origination; and

(3) it enhances the operation of the secondary mortgage market by shortening the average life of mortgages, thereby increasing effective yields to secondary market investors and attracting more funds to the residential mortgage market.[2]

The Bank Board, in adopting 12 C.F.R. § 545.8-3(f) and (g) clearly contemplated their application to all transactions where "all or any part of the real property securing the loan is sold or transferred by the borrower without the association's prior written consent." 12 C.F.R. § 545.8-3(f).[3] The Board

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[2] See Advisory Opinion of the Federal Home Loan Bank Board, Resolution No. 75-647, in the matter of *Schott* v. *Mission Federal Savings and Loan Association*, (July 10, 1975) (hereinafter the "*Schott* Opinion").

[3] This fact is further underscored in the Bank Board's Resolution initially proposing the due-on-sale regulations—"The provisions of

intended a land sales contract to trigger the application of a due-on-sale clause, for otherwise that type of sale could be used by borrowers nationwide to circumvent the Board's response to the three major policy concerns it had when it adopted the regulations.

A land sales contract makes a new person, whose credit has never been reviewed by the lender, the new source of the association's income. Furthermore, the lender has no opportunity to update the interest rate to reflect current market conditions, and the life of the mortgage is extended. Generally, land sales contracts provide that a new person actually is the source of the loan installments as they become due, that actual possession of the property is transferred, that the equitable title of the property is transferred, and that the equal title to the property also is ultimately transfered. The Board's *Schott* Opinion clearly indicates that due-on-sale clauses used by federal savings and loan associations in their mortgages or deeds of trust are designed to be activated under these circumstances.

Counsel for the Bank Board and the Federal Home Loan Mortgage Corporation ("FHLMC") previously have taken this identical position. Thus, in a February 21, 1980 opinion letter Bank Board Associate General Counsel Plapinger stated —

> "As indicated above, § 545.8-3(g) provides that an association shall not exercise a due-on-sale clause because of the creation of a subordinate lien. However, the type of subordinate lien envisioned by this regulation is a standard second trust. We do not consider a land sales contract in which the parties intend to have full equitable title pass immediately to qualify as a "subordinate lien" within the meaning of the regulation. *We conclude, therefore, that a typical land sales contract* or the arrangements you de-

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paragraph (f) would apply to any sale or transfer of the loan security property by the borrower . . . including any sale or transfer through an installment land contract or similar means of sale." Bank Board Resolution No. 76-100, p. 8 (February 6, 1976).

scribe of the purported loan, *would trigger a due-on-sale clause . . .*" (Emphasis supplied)

This opinion is fully in accord with the position taken by the FHLMC:

> "The fact which is central to a determination of whether the lender has the right to accelerate the loan is whether title to the property has been transferred. When property is sold under a land contract, legal title to the property is frequently not transferred to the buyer until some later time which is specified in the contract, i.e., after a certain percentage of the purchase price has been paid. Even though legal title may not be transferred immediately, however, equitable title is deemed to be transferred at the time of the sale. *Thus sale of the property under a land contract is as much a sale or transfer, which gives the lender the right to declare all sums secured by the mortgage to be immediately due and payable, as is the sale of the property through any other financing mechanism.*" (Emphasis supplied)[4]

Because a land sales contract (a) is substantially the same as an outright sale, (b) raises the same three policy concerns addressed by the Board in the *Schott* Opinion, and (c) is a situation where "all or any part of the real property securing the loan is sold or transferred" (12 C.F.R. § 545.8-3(f)), federal associations have the right under due-on-sale clauses to declare all sums secured by a mortgage to be immediately due and payable in connection with a transfer pursuant to a land sales contract.

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[4] Letter from Federal Home Loan Mortgage Corporation Assistant General Counsel Browne to Mr. William Dunn (January 15, 1980).